

## *ZOOM OUT*

### *The question:*

#### **Procedural rules of international courts and tribunals: Between change and stability**

*Introduced by Beatrice I. Bonafé*

International procedural law has drawn increasing attention in the last years. This Zoom-out is dedicated to an aspect of international procedural law that nonetheless is generally overlooked, that is, the very characteristics of international procedural rules when conceived of as sources of international law. Basically, two main sets of questions have been submitted to the authors:

1. Can international procedural rules be regarded as ‘ordinary’ international rules? Are they adopted by the same actors and by having recourse to the same processes as any other international rule? Are they applied, interpreted and enforced in the very same way?
2. Assuming that international procedural rules have special features, to what extent do they differ from ‘ordinary’ rules? Is there a general distinction to be made between procedural and substantive rules? Which are the reasons that might explain differences (or points of contact) in the procedural regime from one jurisdiction to the other?

As to the first set of questions, they have been prompted by the realization that procedural regimes are certainly specific to each dispute settlement body, but they seem to share special features when compared to ‘ordinary’ sets of international rules. And this is true with respect to all the three fields of investigations that have been taken into account: the formation of procedural rules, their interpretation and application, and finally their enforcement. The main example being the role of judges in the adoption of international procedural rules. While ‘ordinary’ rules are mainly created by States, when it comes to procedural law, judges are clearly the main (if not the exclusive) rule-makers, even when States do all their best to maintain control over procedural rule-making. As far as

the interpretation and application of procedural rules are concerned, the analysis shows a common tendency to use the same general rules that govern the interpretation and application of all international rules, such as those codified by the Vienna Convention on the Law of Treaties, but also a special role that internal institutional apparatuses may play from time to time. Finally, as regards the enforcement of procedural law, every dispute settlement mechanism generally has a specific regime. Nevertheless, it appears from the following contributions that most of the time the rules providing for consequences to be attached to the breach of procedural rules are not very sophisticated and that the lack of sanction does not have an impact on the existence of such procedural rules.

As to the second set of questions, our main assumption was that international procedural rules reflect a special balance between the need for change and adaptation to special interests or circumstances and the need to ensure stability of international dispute settlement. As legal rules, procedural law is meant to ensure legal certainty. This purpose has a special meaning in the delicate phase of international relations in which the parties have to settle their disputes. In such circumstances, it is very important to know in advance what rules will be applicable, which are the procedural options as well as the consequences that may be attached to the failure of compliance with the procedural regime. As to the reasons for ‘stability’, international procedural rules largely tend to overlap in the application made by international judges – a good example being the regime of provisional measures – so that predictability and transparency would serve the purpose of an effective international dispute settlement. As to the reasons for ‘change’, international procedural rules may sometimes need specific adjustments and integration according to interests of the parties, to the particularities of a certain field of international law, to the developments of the international community, to the broader needs of sound administration of justice, and so on. Thus, all these elements could be taken into account to explain the existence of both diverging regimes of procedural law and common trends or procedural principles under international law.

It was to discuss these issues that a group of scholars gathered at the Sapienza University of Rome on 3 May 2019. *QIL* will publish in this Zoom-out papers analysing the specific characteristics of procedural rules applicable before the International Court of Justice (Paolo Palchetti), the International Tribunal for the Law of the Sea (Niki Aloupi),



the World Trade Organisation dispute settlement bodies (Giovanna Adinolfi), and investment arbitral tribunals (Hervé Ascensio). The debate between the participants was extremely lively and addressed a number of issues that we hope will enrich this Zoom-out.

